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No. 98-2

In The

Supreme Court of the United States

October Term, 1997

METROPOLITAN LIFE INSURANCE COMPANY,

Petitioner,

vs.

RICHARD SABO,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should review the decision of the Third Circuit which held that Pennsylvania's law regulating trade practices in the business of insurance is not invalidated, impaired, or superseded under the McCarran-Ferguson Act [15 U.S.C. § 1012(b)] by a federal Racketeer Influenced and Corrupt Organizations Act claim, (hereinafter "RICO") [18 U.S.C. § 1964(c) (Supp. I 1995)], alleging unfair and deceptive sales practices in the sale of life insurance, where the state regulatory scheme, like RICO, expressly allows for private rights of action, the remedies available to victims under state law consist of a full panoply of damages, including treble damages, substantial exemplary damages and attorneys fees, and where the State's legislative policy clearly does not favor administrative enforcement over private lawsuits as a means of redressing the harm caused by fraudulent insurance practices.

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The opinion of the court of appeals is reported as *Sabo v. Metropolitan Life Insurance Company*, 137 F.3d 185 (3rd Cir. 1998). The District Court's opinion, also entitled *Sabo v. Metropolitan Life Insurance Company*, No. Civ. A.94-307, 1995 U.S. Dist. WL 928256 (W.D. Pa. Jan. 4, 1995) is not officially reported. The decisions of both courts are included in the petition for certiorari of the Petitioner.

STATEMENT OF JURISDICTION

The decision upon which Petitioner seeks review was entered by a panel of the Third Circuit Court of Appeals on February 23, 1998, and petition for rehearing with suggestion for rehearing *en banc* was denied on March 31, 1998. Metropolitan Life Insurance Company (hereinafter "MetLife") submitted a Petition for Writ of Certiorari to this Court on June 29, 1988. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1254(1) and 2101(c) (1998), to review that decision as stated therein by Petitioners. Respondent brings this opposition to MetLife's petition pursuant to Rule 15 of the Rules of the Supreme Court of the United States.

The Third Circuit Court of Appeals exercised jurisdiction over federal claims pursuant to 28 U.S.C. § 1331 (1998) and over supplemental state tort claims under 28 U.S.C. § 1367 (1998). Its appellate jurisdiction arose under 28 U.S.C. § 1291 (1998) to review District Court final orders. The District Court exercised jurisdiction pursuant to 28 U.S.C. § 1331 (1998) and the Magistrates Act, 28 U.S.C. §§ 636(b)(1)(A) and (B) (1998).

STATUTES AT ISSUE

MetLife's petition addresses principally the interpretation of section 2(b) of the McCarran-Ferguson Act, which provides, in pertinent part:

> No Act of Congress shall be construed to invalidate, impair or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance.

McCarran-Ferguson Act, 15 U.S.C. § 1012(b) (1998).

Federal civil remedy provisions of the Racketeer Influenced and Corrupt Organizations Act are also implicated by this petition, as are civil remedy provisions of the Pennsylvania Unfair Insurance Practices Act (hereinafter "UIPA"), Act of July 22, 1974, P.L. 589, No. 205 § 1, *et seq.*, 40 P.S. § 1171.1, *et seq.* and the Pennsylvania Unfair Trade Practices Consumer Protection Law (hereinafter "CPL"), Act of Dec. 17, 1968, P.L. 1224, No. 387 § 201, *et seq.*, 73 P.S. § 201-1, *et seq.* The full text of the pertinent statutory provisions of these statutes are set forth in Appendix C of Met Life's Petition for Writ of Certiorari.

STATEMENT OF THE CASE

In 1988, Respondent, Richard Sabo (hereinafter "Sabo") became a representative of MetLife selling life insurance to customers. During his employment, he learned that a group of management-level sales agents had embarked upon two (2) schemes to defraud then current MetLife policyholders.

Under the first scheme, called "churning," the representatives were encouraged to identify policyholders with substantial cash

surrender values ("juice") in their policies. The policyholders would then be approached by the representative and/or the management-level sales agents who convinced them to use the cash surrender value to purchase other insurance policies, thereby generating commissions for the sales personnel.

Many of the victims of churning were elderly couples for whom new life insurance policies were expensive and unnecessary. The scheme was implemented through false and misleading statements whereby policyholders would be led to believe that the new policies would be supported entirely by the cash value of the existing policies so that there would be no premiums due. In most cases, however, the cash value of the existing policies were insufficient to cover the premiums for the new policies and customers began receiving unexpected premium bills.

In addition to this scheme, Sabo learned of at least one other fraudulent scheme perpetrated by MetLife sales agents. This scheme was called the "50/50 plan," and involved misrepresenting life insurance policies as savings accounts.

Sabo soon realized that these schemes were perpetrated not only by a small group of agents but had become a company-wide program, condoned at the very highest levels of MetLife's management. The prime perpetrators of these schemes were the individual defendants in the District Court - Antonino, Sherman and Schram.

Sabo, however, refused to participate in these schemes. He refused to allow the sales agents to have access to those of his policyholders whose policies had "juice." Moreover, when he received a complaint about churning from a policyholder, he directed the policyholder to the Pennsylvania Insurance Commission. When Antonino learned of the Insurance

Commission complaint, he confronted Sabo and embarked upon a campaign of intimidation, retaliation and defamation. Sabo was demoted. He was deprived of his clients, his commissions income and his manger's income. Ultimately, he lost his job and the investment he had made in the development of his customer base.

After Sabo was fired, he was subject to an ongoing pattern of retaliatory action by MetLife. The retaliation included efforts by MetLife to interfere with Sabo's relationships with his customers, to spread false rumors and defamatory information and, in general, to make life miserable for him.

In 1994, as a consequence of the complaints from policyholders sent to it by Sabo, the Insurance Commission, following an extensive market survey investigation, fined MetLife One Million Five Hundred Thousand ($1,500,000) Dollars.

In 1994, Sabo caused to be filed in the United States District Court for the Western District of Pennsylvania a Complaint asserting claims under RICO. Sabo claimed RICO violations against him occurring both when he was an employee and after he was fired. Sabo also filed a RICO Case Statement outlining with great detail the fraudulent schemes.

Sabo charged in his RICO Case Statement that the two (2) schemes constituted two (2) patterns of racketeering activity in violation of 18 U.S.C. §§ 1962(a), (b) and (c). He also charged the existence of a third scheme involving the encouragement of sales representatives to invest their own money in the development of a customer base. This investment of their own money made the representatives particularly vulnerable to control by MetLife. If the representative refused to go along with the other schemes after developing a customer base, he or she lost

that investment, along with his or her own income and employment.

Upon motion of MetLife, the Honorable Gary Lancaster dismissed the RICO claims as violative of section 2 of the McCarran-Ferguson Act.

On appeal, the Court of Appeals for the Third Circuit reversed, holding that in Pennsylvania, the McCarran-Ferguson Act does not prohibit a RICO action against an insurance company for the conduct of which Sabo complained.

The Third Circuit compared RICO with the law of Pennsylvania regulating the business of insurance and found that both provided for private rights of action for the conduct alleged by Sabo. While the Pennsylvania UIPA was not intended to confer a private right of action to *enforce* its provisions, UIPA specifically and expressly preserved private rights of action which existed under other laws and decisions, including the Pennsylvania Consumer Protection Law, and judicial decisions allowing actions for common law fraud and deceit in cases where persons are victimized by illegal insurance practices.

Looking to the teaching of this Court in *Securities and Exchange Comm'n v. National Securities, Inc.*, 393 U.S. 453 (1969), the Third Circuit saw no invalidation, impairment, or supersedence of Pennsylvania insurance law by the allowance of RICO claims. Further, the Third Circuit found no indication that the Pennsylvania legislature favored administrative enforcement to the exclusion of private damages actions. It therefore saw "no reason why a federal private right of action cannot co-exist with the UIPA in these circumstances." *Sabo v. Metropolitan Insurance Company*, 137 F.3d at 195.

MetLife petitions this Court for certiorari, contending that the instant case presents an alleged conflict among the courts of

appeals. MetLife argues that: (1) the Third Circuit's decision contravened the purpose and intent of the McCarran-Ferguson Act; (2) the Third Circuit's conflict analysis is contrary to the plain meaning of McCarran-Ferguson; (3) The Third Circuit erred in holding that RICO's remedies would not impair Pennsylvania Insurance Law; and (4) RICO remedies would undermine state insurance regulation.

Sabo urges this Court to deny MetLife's Petition for Certiorari. In doing so, Sabo contends that: (1) the Third Circuit decision is not in conflict with the decision of any other circuit court; (2) the allowance of a RICO claim in the context herein would not "invalidate, impair, or supersede" state insurance law; (3) that the Pennsylvania insurance law allows for *both* private rights of action to remedy insurance fraud as weil as remedies in the form of treble and exemplary damages which may be even more severe than the treble damages awardable under RICO; and, (4) the Third Circuit correctly decided the instant case.

REASONS FOR DENYING THE WRIT

I.

CERTIORARI SHOULD NOT BE GRANTED IN THIS CASE SIMPLY BECAUSE CERTIORARI WAS GRANTED IN *HUMANA*.

Initially, MetLife asks this Court to grant its petition because it says this case presents a better opportunity to resolve the alleged conflict among the circuits than the case of *Humana v. Forsyth*, 114 F.3d 1167 (9th Cir. 1997), *cert. granted*, 66 U.S.L.W. 3793 (U.S. June 22, 1998), on which this Court granted certiorari. (Pet. for Writ of Cert. pg. 7). Contrary to MetLife's contention, however, this case does *not* present substantially

the same question with respect to which this Court granted certiorari in *Humana*. Accordingly, this Court's grant of certiorari in *Humana* provides no reason to grant certiorari in this case.

MetLife contends that the instant case "presents the conflict in the Courts of Appeals even more directly and compellingly than *Humana*," pointing out, in Footnote 6, that the *Humana* Court may have *erroneously assumed* that the Nevada insurance statues do *not* provide a private right of action, whereas, the Pennsylvania insurance statute [UIPA] "*clearly* does *not allow* for a private right of action." (Pet. for Writ of Cert. pg. 6, fn. 6) (emphasis supplied).

Presumably to MetLife, the fact that the UIPA "clearly does not allow for a private right of action" makes the instant case a better one for this Court to review. (Pet. for Writ of Cert. pg. 6, fn. 6).

MetLife's contention in this regard, however, is wrong. Its position in effect constitutes an implied admission that the instant case is not an appropriate vehicle for this Court to review the reach of the McCarran-Ferguson Act. Since UIPA *does* in fact expressly allow for a private right of action for insurance fraud, the issue which MetLife wishes this Court to review is not present.

While the provisions of UIPA provide for administrative action and have been held not to permit a private party to bring a private action under UIPA itself, UIPA nevertheless, by its *express terms*, *allows for* private causes of action for victims of insurance fraud available under other Pennsylvania statutes and decisional law, including the Pennsylvania CPL and common law actions for fraud and deceit. (*Cf. Wright v. North Am. Life Assurance Co.*, 539 A.2d 434 (Pa. Super. 1988)).

Section 1171.13 of UIPA, headed "Provisions of act additional to existing law," says:

> The powers vested in the Commissioner by this act are additional to any other powers to enforce any penalties, fines or forfeitures authorized by law with respect to the methods, act or practices declared to be unfair and deceptive.

40 P.S. § 1171.13.

As the Third Circuit correctly held, the Pennsylvania framework of insurance regulation includes and allows for private rights of action under the state's consumer protection law and common law of fraud and deceit. (*Cf. Pekular v. Eich*, 513 A.2d 427 (Pa. Super. 1986)).

Moreover, MetLife recognized this fact but chose to bury its recognition in a footnote, in which also it sought to make unsubstantiated distinctions between RICO and Pennsylvania common law with regard to *discretionary* versus *mandatory* remedies and burdens of proof. (Pet. for Writ of Cert. pg 16, fn.9).

Given the availability of *substantial* exemplary damages and attorneys fees under Pennsylvania's consumer protection law (*See infra*, Point III, below) to victims of insurance fraud, it is difficult to believe that the fact that RICO's treble damages are mandatory or that there is a different burden of proof would imbalance the regulatory scheme represented by Pennsylvania law. MetLife does not enlighten us on how this would happen. In fact, Pennsylvania has shown no determination to limit damages awardable to the victims of insurance fraud against insurers.

Since *both* RICO and the Pennsylvania insurance statute allow for private rights of action to redress insurance fraud, the instant case does *not* provide an opportunity to decide the same question as was presented by *Humana*, which dealt with a statute which *expressly limited* jurisdiction over trade regulation of insurance to the insurance commissioner.

The difference between the state statutes at issue in *Humana* and *Sabo* makes it clear that *Sabo* does not require review by this Court.

Contrast Pennsylvania's statute with Nevada's, which says:

> Notwithstanding any other provision of law, *the commissioner has exclusive jurisdiction* in regulating the subject of trade practice in the business of insurance.

Nev. Rev. Stat. § 686 A. 015 (emphasis supplied).

As recognized by the Court of Appeals in *Humana*, Nevada gave "exclusive jurisdiction" to regulate the *trade practices* of the business of insurance to the Commissioner of Insurance. (*Humana*, 114 F.3d at 1480) Nev. Rev. Stat § 686 A.015. (An area in which the Nevada legislature appears to have given a private right of action is in the area of claim *settlement*. Nev. Rev. Stat. § 686 A.310, *not* trade practices).

Accordingly, *Humana* fairly raises the questions of whether a RICO private right of action would invalidate, impair, or supersede a state regulatory scheme in which redress is *expressly limited* to administrative remedy and private rights of action for fraudulent insurance practices is prohibited.

That question is *not* raised in the instant case.

By contrast, Pennsylvania's statutory scheme for regulating *trade practices*, like RICO, *allows* for private rights of action, compensatory, treble and substantial exemplary damages and attorney fees.

The Pennsylvania Superior Court has noted that it sees no inconsistency between the UIPA providing for administrative investigation and an imposition of limited penalties and the CPL providing a means by which a consumer may privately seek compensation for wrongs allegedly suffered:

> Our conclusion that there is no inherent irreconcilable conflict is supported by the fact that the UIPA contains *no provision either stating or implying* that the power vested in the Insurance Commissioner represents the *exclusive means* by which an insurer's unfair or deceptive acts are to be penalized *or that the insured is precluded from seeking private compensation* for damages incurred. Further, we are mindful of the fact that our Legislature did not see fit to exclude insurers, insurance agents or insurance transactions from the broad scope of CPL regulation in either the original enactment of the CPL in 1968 or, more importantly, in its subsequent reenactment in 1976, a full two years *after* the enactment of UIPA.

Pekular, 513 A.2d at 433-34 (emphasis supplied).

The Superior Court, like the Third Circuit, detected no legislative intent in Pennsylvania to invest insurance companies with special protection from private causes of action leading to substantial damages, including treble and exemplary damages and attorney's fees:

> We believe that the Legislature has determined that an insured, like any other consumer, may seek compensation for damages incurred as a result of unscrupulous conduct under the provisions of the CPL and that *the limited penalties of the UIPA do not represent the sole and exclusive deterrent to alleged unfair or deceptive acts of insurers and their agents.*

Pekular, 513 A.2d at 434 (emphasis supplied).

Pennsylvania litigants, therefore, are encouraged by the legislature to run to the courthouse, rather than turn to the state insurance department for redress.

Such encouragement does not, in fact, impair the ability of the Insurance Commission to regulate. In the instant case, the availability of private remedies for the conduct complained of did not hamper the Insurance Commissioner in its ability to conduct a Market Conduct Examination and fine MetLife One Million Five Hundred Thousand ($1,500,000) Dollars for the very schemes Sabo sued over.

MetLife's contention that this Court should grant its petition because it granted certiorari in *Humana* is wrong and should be rejected.

II.

THERE IS NO CONFLICT BETWEEN THE DECISION OF THE THIRD CIRCUIT AND THE DECISIONS OF THE OTHER CIRCUITS.

MetLife acknowledges and Sabo agrees that a writ of certiorari is appropriate where "a United States court of appeals has entered *a decision in conflict* with the decision of another

United States court of appeals on the same matter." Sup. Ct. R. 10(a) (emphasis supplied).

MetLife argues that courts of appeals are in *direct conflict* on the issue of RICO applicability relative to the individual state laws governing insurance. (Pet. for Writ of Cert. pg. 6). Further, MetLife asserts that a resolution be had in the interests of resolving an *"issue of national concern." Id.*

MetLife's assertion that a *"direct conflict"* exists among appellate courts amounts to a self-serving over-simplification.

Although the conclusions derived by circuit courts considering the question of civil RICO in the context of the McCarran-Ferguson Act seem to lack in uniformity, the result-oriented analysis is not indicative of a *"direct conflict"* among appellate courts. Moreover, that does *not* mean that the decision of the Third Circuit in this case conflicts with a decision of another circuit court.

The differences are not surprising in view of the operative purpose underlying the McCarran-Ferguson Act. A practical view and consistent application of the McCarran-Ferguson Act dictates that different *decisions* will occur not only between the circuits, but within the circuits.

It is to be expected that, where each state may adopt its own independent regulatory scheme for the enforcement of insurance laws, the rights and liabilities of the parties will vary between those states as a function of that diversity. This is the very reason that Congress adopted the McCarran-Ferguson Act.

It is, in view of each state's right to enact its enforcement framework, unrealistic to expect the establishment of a single policy governing the applicability to RICO of insurance law in

all fifty (50) states. Some states will rely on administrative enforcement; some states will not.

Such an expectation, implemented in court decisions, would directly contravene the very authority, subject to the stated limitations, specifically reserved to the several states under the McCarran-Ferguson Act.

The McCarran-Ferguson Act is a statute of distinction, not commonality. It is axiomatic that a blanket approach is contrary to the implementation of an act designed to preserve the diversity of state power.

Nevertheless, other circuit courts have embarked upon different analyses in attempting to deal with McCarran-Ferguson in the RICO context. The First, Seventh and Ninth Circuit Courts of Appeals have used the so-called direct conflict analysis. *See Villafane-Neriz v. FDIC*, 75 F.3d 727, 736 (1st Cir. 1996) (Assessing whether FDIC regulations are precluded by McCarran-Ferguson Act); *NAACP v. American Family Mut. Ins. Co.*, 978 F.2d 287, 295-97 (7th Cir. 1992) (Assessing whether Fair Housing Act is precluded by McCarran-Ferguson Act and commenting that "federal regulation of a subject . . . does not prevent states from adding remedies to the arsenal established by federal law.")[1]; *Merchants Home Delivery Service, Inc. v. Frank B. Hall & Co.*, 50 F.3d 1486, 1491-92 (9th Cir. 1995) (Congress did not intend to entirely cede the field of insurance); and, *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1480 (9th Cir. 1997) (That RICO permits plaintiffs to

1. In its application of the direct conflict analysis (*i.e.*, State and federal rules that are substantively identical but differ in penalty do not conflict with or displace each other) the Seventh Circuit relied on this Honorable Court's holding in *Silkwood v. Kerr McGee Corp.*, 464 U.S. 238 (1984) (States may provide penalties for violating provision of state law relating to nuclear power even though federal law otherwise preempts field).

maintain a private right of action for conduct proscribed by Nevada's administrative scheme does not create a conflict between state and federal law), *cert. granted*, 66 U.S.L.W. 3793 (U.S. June 22, 1998) and (No. 97-303, October Term, 1997).

Other circuit courts have used the so-called "upset the balance" analysis. The upset the balance approach is premised on the proposition that a federal law *may* "invalidate, impair, or supersede" state law based solely on the existence of greater remedies under the federal law, *even if the federal law and the state law are alike in terms of the substantive conduct which they prohibit.*

Arguably, the Fourth, Eighth, and to a certain extent the Sixth Circuit Courts of Appeals have indicated a *willingness* to accept an upset the balance approach. *See Ambrose v. Blue Cross & Blue Shield of Virginia*, 891 F. Supp. 1153, 1166-68 (E.D. Va. 1995), *aff'd without opinion*, 95 F.3d 41 (4th Cir. 1996) (Prospect of enhanced damages under RICO would diminish the state enforcement mechanism); *Doe v. Northwest Bank Minnesota, N.A.*, 107 F.3d 1297, 1307 (8th Cir. 1997) (Intrusion of RICO's substantial damage provisions into a state's insurance regulatory program may impair state law and bar application of RICO); *Kenty v. Bank One, Columbus, N.A.*, 92 F.3d 384, 392 (6th Cir. 1996) (RICO and state laws conflicted in substantive reach and in remedies).

Irrespective of the analytical approach, however, any anti-preemptive analysis in the context of the McCarran-Ferguson Act requires an evaluation of whether application of a federal statute, in this case RICO, impacts in *one of three* specifically enumerated ways a particular state law scheme. If the application of a federal law (one not specifically addressing the business of insurance) would *invalidate, impair, or supersede* the state law, then the federal law is pre-empted by the state law.

It is logical to assume that a direct conflict analysis is a prerequisite to an upset the balance analysis. Practically speaking, if the substantive provisions of a state and federal law are in conflict or asymmetrical, then an *invalidation* is imminent. If federal law permits conduct that state law prohibits, upon observing the dissimilarities, no further analysis *need* be made.

However, upon finding that the substantive provisions of a federal and state law are similar, further analysis *may* be done to ascertain, whether the application of the federal law would *impair* or *supersede* the state law. The Third Circuit in the instant case performed that analysis.

The decision of the Third Circuit in this case is *not* in "*direct conflict*" with a decision entered by *any other* United States court of appeals respecting the statutory construction of "invalidate, impair, or supersede" as contained in the McCarran-Ferguson Act relative to a preemptive analysis.

The Third Circuit's decision that the availability of remedies to a private litigant under the federal RICO statute does not "invalidate, impair, or supersede" Pennsylvania's comprehensive system of state insurance regulation, which also includes private rights of action and exemplary damages, was based on its full-scale comparative analysis of both substantive and remedial provisions of the federal and state law. Therefore, the decision entered by the Third Circuit is not in conflict with a decision entered by any other circuit court in view of the Third Circuit's integrated analytical approach.

A. Pennsylvania's Comprehensive Legal Framework Regulates the Business of Insurance Only to the Extent Permitted Under the McCarran-Ferguson Act.

There is no dispute but that Pennsylvania enacted its Unfair Insurance Practices Act, for the purpose of exercising its *full*

regulatory authority under the McCarran-Ferguson Act. 40 Pa. S. § 1171.2 (1992).[2]

The McCarran-Ferguson Act did not cede *all* regulatory power over the insurance business to the states. That Act, in relevant part, provides that:

> *No Act of Congress* shall be construed to invalidate, impair, or supersede any law enacted by any State . . . , *unless such Act* specifically relates to the business of insurance . . .

15 U.S.C. § 1012(b)(2) (emphasis supplied).

The Congressional intent is plain and unambiguous — Congress expressly reserved to the federal government certain powers to regulate the business of insurance and, therefore, the Act may not reasonably be construed to have granted the states unfettered regulatory power. *See Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 210 (1979) (The starting point in the Act's interpretation [statutory construction] is the

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2. That provision, in relevant part, states that:

> § 1171.2. Declaration of purpose
>
> The *purpose* of this act is to *regulate* trade practices in the *business of insurance in accordance* with the intent of Congress as expressed in the *act of Congress of March 9, 1945* (Public Law 15, 79th Congress) [McCarran-Ferguson Act], by defining or providing for the determination of all such practices in this state which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting trade practices so defined and determined.

40 P.S. § 1171.2 (emphasis supplied).

language of the statute itself) and *Sabo v. Metropolitan Insurance Company*, 137 F.3d 185, 223-26 (3rd Cir. 1998).

Sabo agrees with the Ninth Circuit's observations relative to the Congressional intent that the Act not be read as *excluding* all federal regulation within the business of insurance. Those anti-preemptive observations include the following:

> (1) The Act's exemption of federal laws which specifically relate to the business of insurance weighs against a congressional intent wholly to abandon the field to the states;
>
> (2) Only federal statutes which "invalidate, impair, or supersede" state insurance statutes are "preempted"; and,
>
> (3) If Congress had intended to cede the field, it could have readily provided that no federal statute shall be construed to apply to the business of insurance.

Merchants Home Delivery Service, Inc. v. Frank B. Hall & Co., 50 F.3d 1486 (9th Cir.), *cert. denied*, 516 U.S. 964 (1995).

Pennsylvania legislators recognized the limitation upon state powers to regulate the business of insurance and, accordingly, the UIPA impliedly declares that it does not regulate the business of insurance to the *exclusion* of federal regulation.

Moreover, the UIPA's carefully crafted Declaration of Purpose evidences the state legislature's consideration of and acknowledgment that in some instances both federal and state law could collectively "regulate the business of insurance" without invalidating, impairing, or superseding a state law. That

conclusion can be had in view of the Pennsylvania Legislature's express acknowledgment of the parameters of its power to regulate to the extent permitted by Congress within the confines of the McCarran-Ferguson Act.

B. Pennsylvania's Comprehensive Regulatory Framework is Not One of Exclusive Administrative Enforcement and Does Not Usurp its Citizens' Rights to Substantial Civil Remedies.

The UIPA is not the only enforcement mechanism by which Pennsylvania regulates the trade practices of insurance. The UIPA vests broad enforcement powers in the Commonwealth's Insurance Commissioner, but expressly preserves the availability of private remedies to Pennsylvania citizens.

The UIPA does not permit private litigants to enforce its provisions. As MetLife readily admits, however, Pennsylvania "expressly incorporates into its regulatory framework [UIPA] pre-existing common law and statutory causes of action, such as common-law fraud and CPL [Consumer Protection Law] claims." (*See* Pet. for Writ of Cert., pg. 16, fn. 9, *citing* 40 Pa. S. § 1171.13 and *Katz v. Aetna Cas. & Sur. Co.*, 972 F.2d 53, 58 (3d Cir. 1992)).

Similarly, the Third Circuit recognized that Pennsylvania's failure to permit a private remedy under the UIPA cannot be construed to mean that Pennsylvania has adopted a state policy of exclusive administrative enforcement. *Sabo v. Metropolitan Insurance Company*, 137 F.3d at 195.

Further confirming the continuing ability of Pennsylvania citizens to seek civil redress and evidencing a *non-exclusive*[3] administrative enforcement policy is the fact that Pennsylvania

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3. Compare to statutory language in *Humana.*

courts have not barred common law actions for fraud and deceit arising out of insurance practices. *See Wright v. North Am. Life Assurance Co.*, 539 A.2d 434, 438 (Pa. Super. 1988) (Common law actions permitted despite no express provision for private causes of action under UIPA).

In addition to common law actions for fraud and deceit, a Pennsylvania aggrieved insured may seek civil redress and substantial damages under the Pennsylvania CPL. *Pekular v. Eich*, 513 A.2d 427, 432-41 (Pa. Super. 1986). The remedial provisions provided thereunder permit a court to award damages "up to three times the actual damages sustained" as well as attorneys fees. *Sewak v. Lockhart*, 699 A.2d 755 (Pa. Super. 1997).

An aggrieved insured, under common law causes of action for fraud and deceit, may seek substantial relief in the form of punitive damages. Although punitive awards are discretionary, the very nature of the tort of fraud is one which *ipso facto* falls within the ambit of outrageous conduct and, therefore, it is probable that a punitive award will follow upon the finding of liability in the context of fraud. *See Martin v. Johns-Mansville Corp.*, 494 A.2d 1088, 1096 (Pa. 1985) (Punitive damages are available in circumstances involving outrageous conduct).

In any event, while punitive damages are discretionary, their imposition upon a defendant insurance company or agent for fraudulent conduct is certainly possible and foreseeable. Clearly, therefore, the legislature recognized and accepted the possibility and even the likelihood that in a case like *Sabo*, if brought under *state* law, a very large punitive award *could* be entered, in addition to the entry of an award of legal fees. Such an award could easily exceed the treble damage award called for under RICO.

C. RICO is Substantively Parallel to the UIPA.

The UIPA prohibits persons from engaging in unfair or deceptive practices in the business of insurance. 40 S. §§ 1171, *et seq*. The UIPA sets forth an exhaustive list of activity in section 1171.5 as deceptive or unfair practices forbidden under section 1171.4. *Id.*

RICO does not specifically address insurance practices, but prohibits unfair and or deceptive practices. Respondent Sabo, a former MetLife sales representative, filed suit under RICO asserting predicate acts based on deceptive insurance sales practices by MetLife in Pennsylvania (*See* discussion, *infra*).

Both RICO and the UIPA prohibit persons from engaging in unfair or deceptive practices. Accordingly, the Third Circuit Court of Appeals saw no direct conflict in the substantive provisions contained in the UIPA and those contained in RICO. Hence, the Third Circuit determined that RICO is substantively parallel to Pennsylvania's UIPA. *Sabo v. Metropolitan Insurance Company*, 137 F.3d at 192-294. This determination is correct. The conduct alleged by Sabo would be prohibited under both RICO and UIPA.

D. RICO Does Not Invalidate, Impair, or Supersede Pennsylvania's Comprehensive Regulatory Framework.

The Third Circuit observed the symmetry between the substantive provisions of RICO and those of the UIPA. *Sabo v. Metropolitan Insurance Company*, 137 F.3d at 195. The symmetry and absence of conflict[4] between the two statutory

4. The Appellate Court defined "invalidate" as follows:

> . . . to weaken or make valueless . . .

Sabo v. Metropolitan Insurance Company, 137 F.3d 185, 193, n.5 (3rd Cir. 1998) *citing*, Webster's Third New International Dictionary 1199, 1131, 2295 (1986).

mechanisms resulted in the Third Circuit's decision that applicability of RICO in this case would not *invalidate* Pennsylvania's state laws governing insurance. *Sabo v. Metropolitan Insurance Company*, 137 F.3d at 194-195.

The Third Circuit, however, did not end its analysis upon its determination that no direct conflict existed (*i.e.*, no invalidation). It further engaged in an analysis of whether a RICO claim would *impair* or *supersede* state law. The Third Circuit correctly noted that a fair and reasoned reading of the UIPA, along with reference to legislative intent or judicial interpretation, would *not* support a conclusion that Pennsylvania legislators intended a state policy based on exclusive administrative enforcement, *Sabo v. Metropolitan Insurance Company*, 137 F.3d at 195. In other words, permitting a private litigant to seek civil redress under RICO provisions would not impair or supersede Pennsylvania's regulatory framework governing the business of insurance.

Moreover, the Third Circuit concluded that the Legislature's awareness of the availability of civil redress under common law claims of fraud and deceit, along with availability of remedies under Pennsylvania's Consumer Protection Law, and acquiescence to their co-existence with UIPA disfavored any suggestion that Pennsylvania legislators intended a policy of exclusive[5] administrative enforcement. The availability of a private right of action under RICO did not, in the view of its lawmakers, impair, or supersede Pennsylvania's administrative framework.

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5. Compare and contrast the state statutes of Pennsylvania and Nevada. *See* discussion, *infra*.

III.

THE PRIVATE ACTION REMEDIES UNDER RICO DO NOT MATERIALLY DIFFER FROM THOSE AVAILABLE UNDER PENNSYLVANIA LAW AND DO NOT UNDERMINE STATE INSURANCE REGULATION.

MetLife argues that the mandatory treble damages and attorney fees available to a litigant under RICO would impair the balance that Pennsylvania seeks to strike among the many concerns and interests underlying insurance regulation. (Pet. for Writ of Cert. pg. 24).

MetLife suggests that allowing RICO claims would impair the regulatory framework and undermine Pennsylvania's legislative policy determinations regarding appropriate sanctions required to deter deceptive insurance sales practices. MetLife believes that wronged policyholders would turn to RICO suits instead of pursuing administrative channels of relief.

MetLife's contentions in this regard are wrong for two reasons: (1) the balance struck by the legislature in Pennsylvania contemplated the full preservation of private rights of action for insurance fraud (*Cf.* § 1171.13, "Provisions of act additional to existing law"); and (2) such private rights of action come with a full panoply of remedies, including *treble damages and attorneys fees* under the Pennsylvania Unfair Trade Practices and Consumer Protection Act *and punitive damages* under Pennsylvania's common law of fraud and deceit. (*Cf. Delahanty v. First Pennsylvania Bank, N.A.*, 464 A.2d 1243 (Pa. Super. 1983)). In other words, MetLife's contention that Pennsylvania's legislative policy favors administrative enforcement of law regulating insurance practice is simply in error.

Moreover, under Pennsylvania law, as interpreted by its Supreme Court, there need be *no* relationship between the

amount of compensatory damages and the amount of punitive damages awarded to a successful litigant. In fact, under Pennsylvania law the salient factor in determining an adequate punitive damage award is the wealth of the defendant (*Cf. Kirkbride v. Lisbon Contractors, Inc.*, 555 A.2d 800 (Pa. 1989) (Approving punitive damages that were ten times compensatory damages)).

The possibility exists under Pennsylvania law, as the legislature must have known, that a defendant in an insurance fraud case, who might be subject to a limited fine by the Insurance Commissioner, could be hit with a large punitive damage award substantially more than three time compensatory damages.

Accordingly, all the motivation which a litigant needs to circumvent the administrative channels of relief is *already* built into Pennsylvania's statutory scheme of insurance regulation. The Pennsylvania legislature obviously did this on purpose.

If the Pennsylvania legislature believes that the potential for large punitive damage awards against insurance companies or insurance agents does not upset the balance that it struck between administrative enforcement and judicial action, can this Court say that Pennsylvania is wrong?

McCarran-Ferguson permits the individual states to strike their own balances in regard to the regulation of insurance trade practices. Pennsylvania has done so. The Third Circuit's decision is strictly in accordance with that balance.

CONCLUSION

For the foregoing reasons, this Court should deny MetLife's Petition. The decision of the Third Circuit properly analyzed and compared RICO with the Pennsylvania insurance trade practice regulatory framework and correctly concluded that: (1) the substantive provisions are parallel; and (2) the balance struck by the Pennsylvania legislature between administrative and judicial enforcement would not be upset by the allowance of a private action under RICO. The Third Circuit correctly concluded, therefore, that allowance of a RICO claim for insurance fraud would not "invalidate, impair, or supersede" state law under McCarran-Ferguson.

Moreover, the fact that this Court has granted certiorari in *Humana v. Forsyth* is no reason to grant certiorari in the instant case since the issues presented by the two cases are significantly different. In *Humana*, state law *prohibits* private rights of action to redress fraudulent insurance trade practices. In the instant case, state law *expressly allows* private rights of action.

Accordingly, Sabo urges this Court to deny certiorari and permit this case to be returned to the District Court for further proceedings consistent with the opinion of the Third Circuit.

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Respectfully submitted,

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